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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-233

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MARYLAND, PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

No. 74-234

THE COMMONWEALTH OF VIRGINIA, PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-13a) is reported at 498 F. 2d 129. The decision, supplemental opinion and order on reconsideration of the Civil Aeronautics Board (Pet. App. 86a-135a), and the initial decision of the Adminstrative Law Judge (Pet. App. 14a-85a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1974. The petitions for writs of certiorari were filed on September 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTION PRESENTED

Whether the Civil Aeronautics Board, after concluding that the existing transatlantic air cargo rate structure unduly preferred New York and unduly prejudiced other east coast and near midwest cities in violation of Section 404(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1374(b)), exceeded its statutory authority or acted arbitrarily or unreasonably in prescribing a mileage-based formula instead of adopting a common rate formula to the east coast cities.

STATUTES INVOLVED

Sections 3 and 216(d) of the Interstate Commerce Act, 24 Stat. 380, 49 Stat. 558, as amended and added, 49 U.S.C. 3(1), 316(d), are set forth at Pet. App. 137a-138a. Sections 102(c), 402, 404(b) and 1002(f) of the Federal Aviation Act of 1958, 72 Stat. 740, 757, 760, 789, 49 U.S.C. 1302(c), 1372, 1374(b) and 1482(f) are set forth at Pet. App. 136a-137a.

STATEMENT

Transatlantic air cargo rates are established by filing tariffs with the Civil Aeronautics Board under Section 403 of the Federal Aviation Act, 49 U.S.C. 1373.[1] Rates so

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[1]The rates embodied in these tariffs are fixed by agreement among the members of the International Air Transport Association ("IATA"), a trade organization of domestic and foreign air carriers engaged in scheduled international air transportation.

established are subject to alteration by the Civil Aeronautics Board, if they are unjustly discriminatory, unduly preferential, or unduly prejudicial, under Sections 404(b) and 1002(f), 49 U.S.C. 1374 and 1482(f).

1. *The Initial Decision.* In March 1969, the Board instituted an investigation to determine whether the transatlantic air cargo rate structure established by IATA unduly prefers New York and unduly prejudices Boston, Washington, Philadelphia, Baltimore, Cleveland, Detroit and Chicago. After evidentiary hearings, the Administrative Law Judge issued an initial decision that the transatlantic rate structure unduly prejudices the other named municipalities. He found that for almost every specific commodity rate, the rate per mile was lower for shipments through New York than the equivalent rate for shipments through the other cities; that the lower New York rates encouraged a substantial volume of cargo to move to and from New York by truck rather than by air through the gateway city nearest the shipper; and that, as a result, New York has become a far more important gateway for European air cargo than it otherwise would have been (Pet. App. 56a-63a).

The Administrative Law Judge ruled that the public interest required a common transatlantic cargo rate between Europe and New York, Boston, Philadelphia, Baltimore, and Washington, D.C.,[2] but that the rates for the segments between New York and Detroit, Chicago, and Cleveland should be based upon the mileage at the New York-London rate per mile. The Judge deemed a mileage-based rate structure to all points to have "merit" and to be a lawful remedy under Section 1002(f) (Pet. App. 67a); however, he concluded that common rating the five east coast cities would better encourage decentralization of the North Atlantic cargo flow.

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[2]Common rating several points means making the rates between those points and another point (in this case, Europe) the same.

2. *The Board's Final Decision.* The Board on its own motion reviewed the initial decision. In its final decision, it agreed with the findings and conclusions of the Administrative Law Judge concerning the unlawfulness of the rate structure, but rejected his proposed remedy. Instead, it directed the establishment of rates computed by multiplying the New York-European point rates per mile by the distance in miles between the various United States gateway points and the point in Europe. The Board concluded that common rating would not serve to eliminate inequities in the rate structure, but would instead establish a new set of prejudices and preferences. It also concluded that a common rate structure would result in an overall increase in transatlantic cargo rates to compensate for reduced revenues and decreased yields for transatlantic carriers due to reduction of rates at gateways other than New York to the level of New York (Pet. App. 106a-107a).

The Board stressed that the most equitable and practical rate structure is one based on mileage (Pet. App. 111a):

> Since costs tend to vary with miles flown, basing rates upon mileage will produce a more cost based rate structure than either the current system or common rates. In addition, mileage-based rates preserve to each gateway the relative advantages of its geographic location.

3. *The Decision of the Court of Appeals.* On petition for review by the Commonwealth of Virginia and the Department of Transportation of the State of Maryland, the court of appeals unanimously affirmed the Board's order. The court concluded that the Board had a large measure of discretion in choosing the measures to remedy undue preference and undue discrimination. Upon its review of the record, the court found "substantial evidentiary support" for the Board's order (Pet. App. 8a),

and determined that the order was a reasonable exercise of the agency's discretion and was within its statutory authority (Pet. App. 5a, 9a).

ARGUMENT

The decision of the court of appeals is correct, and the petition presents no issue warranting further review.

1. The Board, upon finding that the existing rate structure was unlawful, was faced with two possibilities—common rating or mileage-based rates—both of which in the opinion of the Administrative Law Judge had merit. The Board weighed the advantages and disadvantages of each, and, applying its expertise, prescribed mileage-based rates as preferable in the public interest. This case involves only a dispute over the wisdom of that choice. Congress has left such questions to the discretion of the Board; nothing in the Federal Aviation Act requires the Board to adopt one formula or the other.

Petitioner's argument asks this Court to substitute its view of the preferable public policy for the Board's in a technical area which has long been recognized to be within the exclusive expertise and discretion of the agency. This Court has rejected a similar claim with respect to the Interstate Commerce Commission's choice of remedy under the comparable "undue preference or prejudice" clause of Section 3 of the Interstate Commerce Act, 49 U.S.C. 3(1) (*Board of Trade* v. *United States,* 314 U.S. 534, 546):

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * * and upon which its decisions, made the basis of administrative orders operating *in futuro,* are not to

> be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 481 * * *."

The court of appeals correctly applied this test.

The Board's order was within its statutory authority. In contrast to its authority over domestic rates (Section 1002(d), 49 U.S.C. 1482(d)), the Board has no authority initially to prescribe international rates. However, it may alter them to correct undue preferences or prejudices. Section 1002(f).

2. Petitioners also contend that the decision below conflicts with Sections 3 and 216 of the Interstate Commerce Act, 49 U.S.C. 3 and 316, and court decisions interpreting them. They reason that because the Commerce Act served as a model for Section 404(b) of the Federal Aviation Act, 49 U.S.C. 1374(b), the two statutes should be applied in the same way.

This argument is without merit for several reasons. First, the decision below is not in conflict with the Interstate Commerce Act. Section 3 of that Act has been consistently applied to reflect distance and cost-of-service considerations. *United States* v. *Illinois Central R. R.*, 263 U.S. 515; *Maritime Association, Boston Chamber of Commerce* v. *A.A.R.R. Co.*, 95 I.C.C. 539.

Second, as pointed out by the Board (Pet. App. 109a) and the court below (Pet. App. 8a), substantial differences exist in the cost structure of rail and air transportation.[3] These differences cause rates on mileage

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[3]The rail industry is characterized by increasing returns to scale (low variable costs and high fixed costs which cause average costs to decrease as distance increases), while the airline industry is charac-

more nearly to reflect cost of service in the airline industry than in the railroad industry. Consequently, the Board properly required that differences in distance be reflected in differences in rates.

Third, Congress did not intend, in the anti-discrimination provisions of either act, to deprive a locality of the relative advantages of its geographic location. *Alabama Great Southern R. Co.* v. *United States,* 340 U.S. 216, 228. "The law does not attempt to equalize fortune, opportunities or abilities." *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U.S. 42, 46.

Fourth, the common theme of the ICC cases petitioners cite is that equalizing the rates of rail cargo movements would encourage a shift in rail cargo traffic to the disadvantaged ports.[4] Here, however, the Board found that it was mileage-based rates which will "tend to reduce the amount of North Atlantic cargo currently by-passing other gateways in favor of New York * * * and * * * we cannot find the record establishes that only common rates would effectuate such a result" (Pet. App. 111a-112a).

3. Substantial evidence supports the Board's determination that "the most equitable and practical rate structure is one based upon mileage" (Pet. App. 111a). The evidence showed that major costs of air transportation tend to vary with miles flown (Pet. App. 109a). Common rating would thus not eliminate the inequities of the

terized by relatively constant returns to scale (higher variable costs which cause average costs to remain relatively constant as distance increases). Thus distance is a more significant cost factor in the airline industry.

[4] *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573; *Ann Arbor R. Co.* v. *United States,* 281 U.S. 658.

North Atlantic freight rates, but would create a new set of preferences and prejudices (Pet. App. 106a-107a). It would also have an adverse economic impact on affected carriers by reducing their revenues for flights to the more distant points, which in turn would require compensating increases in the transatlantic rates to prevent carriers' earnings from falling below reasonable levels (Pet. App. 107a-108a).

This reasoning shows that the Board's decision was a reasonable exercise of its discretion. It concluded that in air transportation charging the same rate for a longer distance as a shorter one is generally unsound and not justified by the Act. The Board permits such rates only when special circumstances exist (Pet. App. 106a).[5]

4. Finally, the mileage rate the Board prescribed does not continue the undue preference to New York and undue prejudice against the other cities, in violation of Section 404(b).

First, the prohibitions of the anti-discrimination statute are not absolute. The word "unduly" serves a qualifying function in recognition of the fact that all parties are not similarly situated, and all cities are not equidistant from all points. More is required for illegality than the inherent disadvantages of geography; the disadvantage must be "undue" or "unreasonable."[6] Cf. *Alabama Great Southern R. Co., supra.*

Second, the Board's formula does not continue the undue preference and undue prejudice even though there is some variance in certain per-mile rates from the United States

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[5]See, *e.g., Hawaiian Common Fares Case*, 37 C.A.B. 269; cf. Section 4, Interstate Commerce Act, 49 U.S.C. 4.

[6]*Texas & Pac. Railway* v. *Interstate Commerce Commission*, 162 U.S. 197, 219.

gateways to different European points. The important criterion is the per-mile rate between United States gateways and the same European point. Here the per-mile rates are substantially the same.

Third, the fact that European points are common rated within prescribed zones,[7] while United States points are not, does not result in undue preference or undue prejudice to the United States. The Board found no evidence that common-rating points in Europe adversely affect United States shippers or ports (Pet. App. 110a). As the court of appeals explained:

> [I]f, as a result of common-rating in Europe, the mileage rate from New York to a given city in Europe is two cents more or less than the rate from New York to London, it is the same two cents more or less than the rate from any other United States city to London. [Pet. App. 12a.]

Moreover, as the court below found, European common-rating practices are instituted at the insistence of European governments, and the Board cannot alter those practices (Pet. App. 12a).

In sum, the Board's formula removes the undue preferences and prejudices in the existing transatlantic cargo rate structure without ...terposing new preferences and prejudices. The Board's order was a reasonable exercise of its statutory responsibilities under Section 1002(f) to alter rates "to the extent necessary to correct" the undue preferences and prejudices.

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[7]Thus, the rates between New York and Glasgow, London and Lisbon are the same; higher common rates apply between New York and Amsterdam, Paris and Madrid in the next zone (Pet. App. 73a).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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